Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Telephone Number Portability	)	CC Docket No. 95-116
	)	
CTIA Petition for Declaratory Ruling on Local Number Portability Implementation Issues	)	
	)	
	)	
	)	

To: The Commission

COMMENTS OF CINGULAR WIRELESS, LLC

J. R. Carbonell
Carol L. Tacker
David G. Richards
5565 Glenridge Connector
Suite 1700
Atlanta, GA 30342

Its Attorneys

June 13, 2003

TABLE OF CONTENTS

SUMMARY

Two major concerns are presented by the current wireless local number portability ("LNP") requirement. First, as Cingular and others have argued in other proceedings, the Commission lacked the statutory jurisdiction to impose on Commercial Mobile Radio Service ("CMRS") licensees the LNP requirement. Thus, section 52.31 of the Commission's rules must be rescinded. Second, and potentially more importantly, the lack of formal CMRS LNP implementation rules portends substantial consumer confusion and harm arising out of a chaotic implementation on November 24, 2003.

If the Commission decides to retain the CMRS LNP requirement, it must provide the wireless industry with concrete implementing rules. For the wireline industry, the Commission incorporated by reference into its rules industry-developed implementation standards and processes. For the wireless industry, however, the Commission has attempted to wash its hands of the issue and illegally delegate rulemaking authority to the North American Numbering Council ("NANC"). Although the NANC has resolved many wireless LNP issues, a significant number are still unresolved. In any event, however, because the NANC's recommendations have no legal force, there are at present no implementation standards upon which the wireless industry can rely.

To avoid widespread consumer problems and confusion, the Commission must provide reliable and enforceable implementation rules for wireless LNP. To do so, however, the Commission must first conduct a rulemaking to establish a legally sufficient method for providing notice of and obtaining comment on the NANC's recommendations, as well as addressing other unresolved issues.

CTIA's petition identifies several important unresolved issues, but other issues exist as well. Significant among them is the extent to which the LNP requirement affects the Commission's long-standing policy supporting negotiated agreements between CMRS carriers and their customers. Throughout the history of wireless service, customers have received in many cases substantial upfront value (subsidized handsets, other equipment and promotional incentives) in return for a negotiated term of subscription. Cingular, for example, has negotiated agreements with its customers wherein customers have exchanged their ability to port their number when they owe an early termination fee or past-due balance for such benefits.

If implemented, LNP will present the first time that customers in the highly competitive CMRS marketplace can convey decisions to terminate service to their current carrier *through a competing carrier*. As a result, customers face potential harm from losing the opportunity to be reminded of the agreed-upon early termination fee. Indeed, delaying number ports may provide the only reminder consumers will receive that their contract terms are not completed. Unless the porting process accommodates this consumer reminder, the consumer could be obligated to pay a charge that otherwise easily could have been avoided (by delaying the port of the number until after the end of the initial wireless subscription term). Implementing wireless LNP in the current regulatory environment, without any standards or rules, will engender ample customer confusion without this further complication. Other carriers, however, are urging the Commission to adopt standards that would effectively preclude Cingular from

enforcing the early termination fee provision in its agreements – undermining both consumer protection and the longstanding policy against regulating the free market in CMRS consumer agreements.

Again, a reasonable implementation regime for CMRS LNP is possible, but the Commission must do its part to establish the rules of the road. A rulemaking is necessary to establish those rules. If the Commission fails in this duty, consumers will be the ones to suffer.

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Telephone Number Portability	)	CC Docket No. 95-116
	)	
CTIA Petition for Declaratory Ruling on Local Number Portability Implementation Issues	)	
	)	
	)	
	)	
	)	

To: The Commission

COMMENTS OF CINGULAR WIRELESS, LLC

Cingular Wireless, LLC ("Cingular"), a national provider of commercial mobile radio service ("CMRS"), presents these comments on the May 13, 2003 petition for declaratory ruling by the Cellular Telecommunications & Internet Association ("CTIA"), which raises serious implementation issues regarding CMRS local number portability ("LNP").[1] The LNP rules for local exchange carriers ("LECs") incorporate detailed implementation provisions. In contrast, there are no CMRS LNP implementation rules. The Commission attempted to delegate the promulgation of such rules to the North American Numbering Council ("NANC"), a federal advisory committee. The Commission's delegation was unlawful; thus, there are no CMRS LNP standards and processes. This regulatory failure will result in substantial consumer confusion and dislocation.

---

[1] *See Comment Sought on CTIA Petition for Declaratory Ruling on Local Number Portability Implementation Issues,* Public Notice, DA 03-1753 (rel. May 22, 2003).

These fundamental problems can only be resolved in two steps. *First*, the Commission must conduct a rulemaking to reform the process for considering CMRS LNP implementation rules, incorporating legally proper notice and comment provisions. S*econd*, the Commission must conduct a further rulemaking proceeding (pursuant to the reformed process) to adopt CMRS LNP implementation rules, addressing both industry standards-setting activities and business issues that the industry has been unable to resolve. Only by doing so can the Commission avoid substantial confusion and dislocation for consumers. Finally, while CTIA has identified Labor Day as the deadline for dealing with these issues, in reality that date will be much too late to develop, test, and implement the properly adopted CMRS LNP implementation rules by November 24, 2003.

I. THE COMMISSION LACKED STATUTORY AUTHORITY TO IMPOSE THE CMRS LNP REQUIREMENT

As a threshold matter, Cingular wishes to reiterate that the Commission lacked statutory jurisdiction to impose the CMRS LNP requirement in the first instance.[2] Therefore, section 52.31 must be rescinded. An agency has no power to act without a delegation by Congress;[3] it possesses only those powers *granted* by Congress. Stated another way, an agency does not possess all powers *except those forbidden* by Congress – otherwise agencies would have

---

[2] This issue was before the U.S. Court of Appeals for the District of Columbia Circuit in *Cellular Telecommunications & Internet Ass'n and Cellco Partnership d/b/a Verizon Wireless v. FCC,* D.C. Cir. No. 02-1264 (decided June 6, 2003). The Court, however, did not reach the merits of this issue.

[3] *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125-26 (2000); *Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986); *Board of Governors v. Dimension Financial Corp*., 474 U.S. 361, 374 (1986); *Lyng v. Payne*, 476 U.S. 926, 937 (1986); *Stark v. Wickard*, 321 U.S. 288, 309 (1944); *Motion Picture Ass'n v. FCC,* 309 F.3d 796, 801 (D.C. Cir. 2002), *pet. reh'g pending ("MPAA")*.

virtually limitless discretion in violation of *Chevron* and the Constitution.[4] The FCC cannot adopt rules simply because Congress did not expressly preclude such action, especially where Congress left no "gap for the agency to fill."[5]

Section 251 of the Act is the sole statutory provision addressing LNP.[6] Congress not only confined the delegation to the specific requirement (LNP), but also took the next step by limiting the carrier class to which it applies. Section 251 is the only section in the Act dealing with numbering in general and LNP specifically. Therefore, the FCC is empowered to require LNP only to the extent specified in section 251. That section references all telecommunications carriers (including CMRS providers), local exchange carriers ("LECs") and incumbent LECs, and delineates which entities are required to provide LNP. "Statutory provisions *in pari materia* normally are construed together to discern their meaning."[7] Accordingly, the various provisions of section 251, construed together, establish the scope of the Commission's power to require

---

[4] *Railway Labor Exec Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 665, 670-71 (D.C. Cir. 1994) ("*Railway*").

[5] *Railway*, 29 F.3d at 671 (*citing Chevron USA Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1994)). *See also Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d 155, 161 (4th Cir. 1998) ("[A]gency power is 'not the power to make law. Rather, it is the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.'") (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-14 (1976)), *aff'd*, 529 U.S. 120 (2000).

[6] *See Railway*, 29 F.3d at 671; *Chevron*, 467 U.S. at 843-44. *See also MPAA*, 309 F.3d at 801

[7] *MPAA*, 309 F.3d at 801 (*citing Erlenbaugh v. United States*, 409 U.S. 239, 244 (1972)).

LNP – i.e., the Commission is empowered to require LNP only to the extent specified in section 251.[8]

Congress, in section 251, expressly limited the class of carriers to be subject to LNP requirements. Specifically, sections 251(a)-(c) set forth a "carefully-calibrated regulatory regime crafted by Congress," with a "three-tiered hierarchy of escalating obligations based on the type of carrier involved."[9] Subsection (a) sets forth the relatively limited duties applicable to all telecommunications carriers, but is silent regarding LNP. Subsection (b) imposes five separate obligations, including LNP, *applicable only to LECs*, and gives the Commission LNP standard-setting authority. At the same time, Congress defined LECs to *exclude* CMRS carriers unless and until the FCC determines otherwise,[10] a finding the FCC has repeatedly and correctly declined to make.[11] Section 251(c) imposes additional requirements on *incumbent* LECs. Moreover, in contrast to the limited authority to impose LNP in subsection (b), section 251(e)

---

[8] *See Railway,* 29 F.3d at 671; Chevron, 467 U.S. at 843-44. *See also MPAA,* 309 F.3d at 801.

[9] *Guam Public Utilities Commission,* 12 FCC Rcd 6925, 6937-38 (1997).

[10] 47 U.S.C. § 153(26) ("The term 'local exchange carrier' . . . does *not* include a person insofar as such person is engaged in the provision of a commercial mobile service under section 332(c) of this title, except to the extent that the Commission finds that such service should be included in the definition of such term") (emphasis added).

[11] *See Order Denying Forbearance*, 17 FCC Rcd at 14972-73 ("Commercial Mobile Radio Service (CMRS) carriers are not LECs, and thus are not included in section 251(b) . . . ."); *Petition of the State Independence Alliance for a Declaratory Ruling,* 17 FCC Rcd 14802, 14806 (2002) ("CMRS providers are not subject to the statutory requirements imposed on LECs in section 251(b)"); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* 11 FCC Rcd 15499, 15996 (1996) (stating that the FCC will not define CMRS providers as LECs absent evidence that wireless services "replace wireline loops for the provision of local exchange service") (subsequent history omitted); *Administration of the North American Numbering Plan Carrier Identification Codes*, 13 FCC Rcd 3201, 3206 n.21 (1998) (noting that CMRS providers "are not classified as LECs").

gives the FCC plenary authority over numbering administration. Thus, it is clear Congress knew how to include and exclude CMRS carriers regarding LNP and to define the FCC's jurisdiction narrowly (LNP) or broadly (numbering administration) as it deemed appropriate. It reviewed the competitive landscape and decided LNP should be required only of LECs.

The exclusion of carriers other than LECs from LNP requirements and other section 251 requirements reflects a deliberate choice by Congress, negating any implied power of the Commission to choose otherwise. As the Supreme Court has held, "an express statutory requirement here, contrasted with statutory silence there, shows an intent to confine the requirement to the specified instance."[12] Here, Congress intended to confine the LNP requirement to LECs. This is confirmed in the Act's legislative history. The original House bill included portability as one of the "specific requirements of openness and accessibility that apply to LECs as competitors enter the local market."[13] The Act's Conference Report states that "the duties imposed by new section 251(b) make sense only in the context of a specific request from another telecommunications carrier or any other person who actually seeks to connect with or provide services using the LEC's network."[14]

The FCC recognized in implementing section 251 that the statute withdrew authority to impose LNP on wireless carriers:

> The statute . . . *explicitly excludes* commercial mobile service providers from the definition of local exchange carrier, and therefore from the section 251(b) obligation to provide number

---

[12] *Field v. Mans*, 516 U.S. 59, 67 (1995).

[13] H.R. Rep. No. 204, 104th Cong., 1st Sess. 71-72 (1995).

[14] Joint Explanatory Statement, H.Conf. Rep. 104-458, 10th Cong., 2d Sess. 121 (1996).

> portability, unless the Commission concludes that they should be included in the definition of local exchange carrier.[15]

In the same breath, however, the Commission found "independent authority" to require wireless LNP "as we deem appropriate" from the general delegations in sections 1, 2, 4(i), and 332 of the Act.[16] These provisions do not mention LNP, nor can they serve as a jurisdictional basis to override the specific reservations in section 251.

Reliance on these provisions is barred by the canon of statutory construction that "the specific governs the general."[17] This canon is "a warning against applying a general provision *when doing so would undermine limitations created by a more specific provision*."[18] Congress spoke comprehensively and specifically to LNP in section 251(b). Thus, the FCC cannot rely on general powers conferred by sections 1, 2, 4(i) and 332 to negate Congress' contrary directive. The separate statement of Commissioner Furchtgott-Roth in the *2000 Forbearance Reconsideration Order* aptly observes:

> The Commission has grounded its [wireless LNP] authority in sections 1, 2, 4(i), and 332 of the Communications Act. I have long voiced concern about this agency's efforts to impose costly and far-reaching regulatory obligations based on authority cobbled together from various general and ancillary provisions of the Act. Such assertions of jurisdiction are particularly troubling here in

---

[15] *Telephone Number Portability,* First Report & Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8352, 8431 ("*LNP First Report*") (emphasis added).

[16] *Id*. at 8431-32. The *Order Denying Forbearance* references the *LNP First Report* where, in response to challenges by Petitioners and others, the FCC fully addressed its implied authority to require wireless LNP. *See Order Denying Forbearance*, 17 FCC Rcd at 14972 & n.3.

[17] *Morales v. Transworld AirLines,* 504 U.S. 374, 384-385 (1992) (citing *Crawford Fitting Co. v. J.T. Gibbons, Inc*., 482 U.S. 437, 445 (1987)).

[18] *Variety Corp. v. Howe*, 516 U.S. 489, 511 (1996) (emphasis added).

> light of section 251's statutory provision specifically mandating number portability solely for local exchange carriers.[19]

Nor do these sections grant the Commission independent jurisdiction to impose LNP requirements on CMRS providers. As the Court recognized in *MPAA*, the FCC has "necessary and proper" authority only where another provision contains a specific delegation of authority.[20]

Sections 2 and 4(i) contain no affirmative mandates.[21] Further, Section 1 constitutes a general delegation of authority to the Commission and never mentions LNP.[22] It grants the Commission only such limited authority as is "reasonably ancillary to the effective performance of the Commission's various responsibilities." [23] Courts have upheld the FCC's exercise of ancillary jurisdiction in cases where (1) Congress did *not* expressly address and define the scope of the Commission's authority with respect to the regulated area at issue; and (2) there was a demonstrated need to imply authority to discharge the will of Congress.[24] Here, however,

---

[19] *Telephone Number Portability, Cellular Telecommunication and Industry Association's Petition for Forbearance, Order on Reconsideration*, 15 FCC Rcd 4727, 4739 (2000) (*2000 Forbearance Reconsideration Order*) (Separate Statement of Commissioner Furchtgott-Roth).

[20] *MPAA*, 309 F.3d at 806.

[21] *Cf.* 47 U.S.C. §§ 152, 154(i). Section 4(i) states expressly that the Commission may undertake only those acts that are consistent with the terms of the Act.

[22] *Cf.* 47 U.S.C. § 151.

[23] *United States v. Southwestern Cable Co*., 392 U.S. 157, 178 (1968); *see also California v. FCC*, 905 F.2d 1217, 1240-41 & n.35 (9th Cir. 1990).

[24] *See, e.g., Southwestern Cable*, 392 U.S. at 164-78 (upholding FCC authority to regulate cable where there were no preexisting statutory provisions regarding FCC oversight of the cable industry and the FCC demonstrated a need to regulate flowing from its broadcast responsibilities).

Congress has clearly expressed its will regarding LNP in section 251(b) and thus there is no basis to invoke ancillary authority under section 1.

In fact, section 1 was enacted to ensure that all Americans "have access to wire and radio communication transmissions" and the mandate is a "reference to the geographic availability of service."[25] LNP, however, does not deal with access to service in a particular area. It is a service feature provided to a subscriber who already *has* service.

Finally, section 332 cannot serve as authority for the FCC to impose a wireless LNP mandate. While section 332 does constitute a grant of authority over certain wireless matters, it is silent regarding LNP and thus cannot be read as an override of the specific statutory scheme of section 251(b). Even assuming that the Act did not already speak to the question of which entities must offer LNP, section 332 still would not provide a basis for implied authority. Moreover, this section requires the Commission to treat CMRS providers as common carriers but permits the FCC to forbear from certain statutory requirements normally associated with landline service, *e.g.*, tariffs.[26] It also preempts state regulation over wireless rates and market entry.[27] The main objectives of section 332 are regulatory parity among like wireless services and deregulation.[28] Thus, as the FCC has recognized:

---

[25] *MPAA*, 309 F.3d at 804.

[26] *See* 47 U.S.C. § 332(c)(1)(A). Under the Act and the Commission's rules, a "common carrier" is not the same as a "LEC." "Common carrier" is a broad category of entities that offer services to the public, while "LEC" includes only carriers that offer service within, and access to, a telephone exchange network.

[27] *See id.* § 332(c)(3)(A).

[28] *See* H.R. Rep. No. 103-111, at 259-60 (1993) (emphasizing the purpose of section 332 to achieve "regulatory parity" among providers of "equivalent mobile services"); *Petition of the Connecticut Department of Public Utility Control*, 10 FCC Rcd 7025, 7030-31 (1995)
(continued on next page)

> Congress delineated its preference for allowing this emerging market to develop subject to only as much regulation for which the Commission and the states could demonstrate a clear cut need.[29]

No showing has been made (nor could be made) that imposing wireless LNP is needed to carry out the objectives of section 332.

The Commission further expanded it assertion of implied authority to impose wireless LNP in its brief filed in the appeal of the most recent CMRS LNP forbearance petition.[30] The FCC did not dispute that (1) Section 251(b)(2) is the only provision of the Act specifically addressing LNP; (2) Section 251(b)(2) grants the Commission specific authority to impose LNP requirements only on LECs and Section 153(26) defines the term "LEC" to exclude CMRS carriers, unless the FCC finds otherwise;[31] and (3) the FCC has consistently ruled that CMRS carriers are not LECs. But, it did argue that because Section 153(26) grants it authority to define the scope of the term LEC, the Act "suggests strongly that Congress decided to leave the question of extending LEC-specific requirements to CMRS carriers to the expert judgment of the

---

("*Connecticut DPUC*") (recognizing that section 332 expresses a "general preference in favor of reliance on market forces rather than regulation," and "places on [the FCC] the burden of demonstrating that continued regulation will promote competitive market conditions"), *aff'd sub nom. Connecticut Department of Public Utility Control v. FCC*, 78 F.3d 842 (2nd Cir. 1996).

[29] *Connecticut DPUC*, 10 FCC Rcd at 7035 (1995); *see also Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Third Report and Order,* 9 FCC Rcd 7988, 7992 (1994) ("[C]onsumer demand, not regulatory decree, [should] dictate[] the course of the mobile services marketplace.").

[30] *Cellular Telecommunications & Internet Ass'n and Cellco Partnership d/b/a Verizon Wireless v. FCC,* No. 02-1264 (filed Feb. 3, 2003).

[31] 47 U.S.C. §§ 153(26), 251(b)(2).

Commission."[32] This argument stands the statute on its head and is inconsistent with the legislative history.

Nothing in Sections 153(26) or 251 authorizes the Commission to pick and choose LEC-specific requirements to impose on CMRS carriers, absent a finding that CMRS carriers are LECs. Indeed, could it do so, Section 153(26) would be nullified and useless. Section 153(26) authorizes the Commission to determine whether the term LEC should include wireless carriers. If, and only if, the Commission makes that finding, do wireless carriers become subject to a variety of LEC-specific requirements. Moreover, the FCC admitted that:

> Because the development of the wireless industry has a different history -- one in which service already was provided by a number of carriers in 1996, and not through a monopoly -- Congress did not explicitly impose all of the obligations in Section 251 on wireless carriers.[33]

The FCC also argued that it had implied authority over wireless LNP prior to the enactment of Section 251(b)(2) and the 1996 Act evinced "no intent to *take away* the Commission's authority to require telecommunications carriers that are not LECs to offer LNP."[34] The Commission's argument missed the point. Section 251(b)(2) does not constitute a repeal of pre-existing authority. Rather, it sets forth a specific mechanism by which the Commission can impose LNP requirements on wireless carriers which must be followed. Thus,

---

[32] FCC Br. 34.

[33] FCC Br. 34.

[34] FCC Br. at 33 (emphasis added).

insofar as the FCC has correctly decided that CMRS carriers are not LEC equivalents, it lacks authority to impose LNP obligations on wireless carriers.

In any event, the Commission's attempt to create the impression that it had pre-existing authority before the passage of Section 251 and 153(26) in the 1996 Act is wrong. Prior to the 1996 Act, the Commission had "asserted authority" over LNP by way of a "tentative" finding in a Notice of Proposed Rulemaking which asked for comment.[35] It had not issued any final ruling, nor was there judicial review of the matter. The FCC *ruled* it had implied authority only *after* the 1996 Act.[36] Thus, the FCC has not shown there was any LNP authority to be preserved by the 1996 Act's savings clause (47 U.S.C. § 152 note).[37] More important, the enactment of Section 251 resolved the question, setting up a specific mechanism by which the Commission could impose wireless LNP.

The Commission's reliance on case law stemming from its general authority in Sections 1, 4(i) and 332 is without merit. As noted above, ancillary jurisdiction can only be invoked where (1) Congress did *not* expressly address and define the scope of the Commission's authority with respect to the regulated area at issue, and (2) there was a demonstrated need to

---

[35] *See Telephone Number Portability*, 10 F.C.C.R. 12350 (1995).

[36] *See Telephone Number Portability*, 11 F.C.C.R. 8352.

[37] Further, the Supreme Court has "repeatedly 'declined to give broad effect to savings clauses where doing so would upset the careful regulatory scheme established by federal law.'" *Geir v. American Honda Motor Co.*, 529 U.S. 861, 870 (2000) (citations omitted); *see also AT&T & Central Office Telephone, Inc.*, 524 U.S. 214, 227-28 (1998).

imply authority to discharge the will of Congress. The cases cited are consistent therewith.[38] Here, by contrast, Section 251(b)(2) expressly delineates the FCC's authority over LNP.

The Commission's citation to *Qwest Corp. v. FCC*, 252 F.3d 462, 464 (D.C. Cir. 2001), also does not suggest a contrary conclusion. *Qwest* involved a dispute regarding intercarrier compensation, not LNP. Further, the question of whether Section 332 is an independent basis of Commission authority on interconnection matters, has no bearing on whether the Commission has authority to impose LNP obligations on wireless carriers.

Thus, the FCC's theory appeared to be that it has authority to impose wireless LNP because Section 251(b)(2) does not specifically prohibit wireless LNP. A similar Commission theory was recently rejected by the Court as "entirely untenable."[39] Indeed, to uphold the

---

[38] *See* FCC Br. at 35-38. *Rural Telephone Coalition v. FCC,* 838 F.2d 1307, 1315 (D.C. Cir. 1988) (Commission authority to establish the Universal Service Fund can be implied from its statutory obligation to make communications service available to all the people of the United States); *Lincoln Tel. & Tel. Co. v. FCC,* 659 F.2d 1092, 1109 (D.C. Cir. 1981) (extending tariffing obligations to a previously-exempted carrier was appropriate to allow the Commission to ensure that rates and terms and conditions of service are reasonable); *Nader v. FCC*, 520 F2d 182, 204 (D.C. Cir. 1975) (extending rate-setting authority to include prescribing rate of return); *GTE Serv. Corp. v. FCC*, 474 F.2d 724, 731 (2d Cir. 1973) (Commission has authority to require common carriers to provide computer network services through a separate affiliate because such requirement was substantially related to Commission statutory obligations, but has no authority to bar common carriers from purchasing computer services from their own affiliate because such rule was unrelated to the regulation of the communications market); *North American Telecom Ass'n v. FCC*, 772 F.2d 1282, 1292 (7th Cir. 1985) (statute was silent regarding proposed limited regulation of holding companies and the Court noted that "Section 4(i) is not infinitely elastic" and cannot be used to regulate an activity unrelated to the communications industry or to contravene another provision of the Act) (citations omitted); *Mobile Comm Corp. v. FCC*, 77 F.3d 1399 (D.C. Cir. 1996) (statute was silent on payments for pioneers procedures). Judge Edwards, in his dissent to *Mobile Comm,* characterized the FCC's reliance upon implied authority as follows: "charitably speaking, the argument is something akin to the FCC saying that it 'has the power to do whatever it pleases merely by virtue of its existence,' a suggestion that this court normally would view as 'incredible.'" *Id.*, 77 F.3d at 1413 (dissent in part).

[39] *MPAA*, 309 F.3d at 805.

Commission's arguments would provide federal agencies "virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well."[40] While the decision in *MPAA* admittedly addressed First Amendment concerns, the Court relied upon general principles of law and statutory construction recognized in *Railway Labor Executives* to hold that the Commission cannot presume authority to regulate a matter simply because Congress has not expressly withheld such power.[41] Here, the FCC is going even further than in *MPAA* by presuming authority in direct contravention of the Act.

II. ASSUMING THE FCC HAS JURISDICTION, THE CURRENT PROCESS TO ESTABLISH IMPLEMENTATION STANDARDS FOR CMRS LNP IS UNLAWFUL

Given the technical complexity of implementing LNP, the Commission has looked to forums of industry experts, such as the NANC and its subcommittees, for initial recommendations on LNP implementation issues.[42] For LECs, the Commission provided notice and an opportunity to comment[43] on the NANC's April 25, 1997 technical and operational report, reviewed it, and incorporated it into its rules by reference.[44] That report, however, by its own terms, did not address CMRS LNP implementation.[45] As a result, the Commission has

---

[40] *Railway Labor Executives Ass'n*, 29 F.3d at 671 citing *Chevron*, 467 U.S. at 843-44, cited in *MPAA*, 309 F.3d 801, 805-06.

[41] *MPAA*, 309 F.3d. at 805-06.

[42] *See, e.g.,* LNP First Report & Order, 11 FCC Rcd at 8402.

[43] As discussed below, simply releasing a public notice seeking comment on a NANC report does not provide sufficient notice and comment under the APA.

[44] 47 CFR § 52.26(a).

[45] NANC LNPA Selection Working Group Report (April 25, 1997) at § 3.1.

never resolved the basic requirements for CMRS LNP.[46] More fundamentally, however, the *process* in the Commission's rules for relying on the NANC to implement CMRS LNP is legally flawed. After incorporating the wireline report into section 52.26 of its rules, the Commission directed the NANC to provide ongoing oversight of LNP deployment, up to and including acting as the first-line arbiter of any disputes that may arise.[47] In this way, the Commission attempted to delegate to the NANC rulemaking authority, in derogation of the Administrative Procedures Act ("APA"), and decision making authority, in derogation of the Federal Advisory Committees Act ("FACA").

As CTIA has described in detail, upon adopting rules that LECs and CMRS carriers must provide LNP, the Commission directed the NANC to present a report by May 1, 1997, on LNP implementation procedures.[48] The NANC's report states that the "assumptions used in preparation of the 'Architecture and Administrative Plan for Local Number Portability' explicitly excluded wireless" and the "LNPA Technical & Operational Requirements Task Force did not consider wireless concerns in depth during [Number Portability Administration Center Service Management System] requirements development."[49] The report anticipates subsequent work on wireless LNP.[50]

---

[46] *See, e.g.,* CTIA Petition at 5.

[47] *Telephone Number Portability,* Second Report & Order, 12 FCC Rcd 12281, 12351-53 (1997).

[48] CTIA Petition at 8-9.

[49] NANC LNPA Selection Working Group Report (April 25, 1997) at § 3.1.

[50] *Id.*

Even though standards and procedures for wireless LNP were still in development, the Commission at that point largely washed its hands of the process, vesting in the NANC "ongoing oversight of number portability administration."[51] By rule, the Commission directs parties to "attempt to resolve issues regarding number portability deployment among themselves and, if necessary, under the auspices of the NANC."[52] Only where the NANC is unable to resolve an issue does the rule provide for the Commission to place the issue on public notice and render a decision.[53]

As the record of this proceeding amply demonstrates, the LNP implementation processes and procedures have important operational and economic consequences for carriers and clearly fall within the APA's definition of a "rule."[54] The Commission is required to provide notice and opportunity to comment and a statement of the basis and purpose for any rules adopted.[55] It may not simply delegate this process to the NANC. Although there are members on the NANC that represent a broad spectrum of telecommunications interests, and the NANC's subcommittees are open to non-NANC members, the NANC process does not provide the notice and opportunity for comment required by the APA.[56] Indeed, the D.C. Circuit has held that informal industry

---

[51] 47 CFR § 52.26(b)(3).

[52] *Id.*

[53] *Id.*

[54] 5 USC § 551(4) (defining "rule" as "an agency statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy….")

[55] 5 USC § 553(b), (c).

[56] *Id. See also Florida Power & Light Co. v. United States,* 846 F.2d 765, 771 (D.C. Cir. 1988), *cert. denied*, 490 U.S. 1045 (1989) (agencies' "notice must not only give adequate
(continued on next page)

consultation is no substitute for the formal notice and comment required by the APA.[57] The Commission also has never provided a basis and purpose for any work performed by the NANC on CMRS LNP.[58]

By vesting in the NANC decision-making authority over wireless LNP implementation, the process laid out in section 52.26 also violates the FACA, pursuant to which the NANC is organized. The FACA states that the function of committees organized under its authority "should be advisory only" and specifically states:

> Unless otherwise specifically provided by statute or Presidential directive, advisory committees shall be utilized solely for advisory functions. Determinations of action to be taken and policy to be expressed with respect to matters upon which an advisory committee reports or makes recommendations shall be made solely by the President or an officer of the Federal Government.[59]

Despite this limited role prescribed by the statute, the Commission's rules direct the NANC to "provide ongoing oversight of number portability administration,"[60] and to "resolve issues regarding number portability deployment."[61] The rule provides for the Commission to become involved only in situations where a "party objects to the NANC's proposed resolution"[62]

---

time for comments, but also must provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully").

[57] *Sugar Cane Growers Co-Op. of Florida v. Veneman*, 289 F.3d 89, 96 (D.C. Cir. 2002).

[58] *See* 5 USC § 553(c).

[59] 5 USC App. 2 § 9(b).

[60] 47 CFR § 52.26(b)(3).

[61] *Id.*

[62] *Id.*

– although it is unclear how all "parties" would necessarily have notice of the NANC's conclusions, absent APA-required notice procedures or, assuming a party knew of the NANC's recommendations, how such an objection would be lodged. Again, the rule fails to provide for the statement of basis and purpose required by the APA for all federal rules.[63]

Because the NANC, by statute, may serve solely an advisory role, its reports have no force of law. Thus, as CTIA has suggested, "CMRS carriers appear free to implement number portability in any manner they see fit, even if it conflicts with decisions reached in industry fora."[64] Even to the extent that the NANC has reached consensus on CMRS LNP implementation issues, there is no basis for other carriers – or the Commission – to insist that any carrier comply with the NANC's recommendations.

In order to establish a valid CMRS LNP requirement, the Commission must have a legal process for incorporating the NANC's work into enforceable rules. The APA requires that the Commission do more than simply place a NANC report on public notice and adopt it, for this would not provide sufficient notice of the Commission's intended direction. It is well established that, in order for notice to be considered adequate, an agency must "make its views known in a concrete and focused form so as to make criticism or formulation of alternatives possible."[65] The agency must "describe the range of alternatives being considered with reasonable specificity."[66] A general request for comments is inadequate because "[i]nterested

---

[63] 47 USC § 553(c).

[64] CTIA Petition at 8 n.16.

[65] *Small Ref. Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 548 (D.C. Cir. 1983) (quoting *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977)).

[66] *Id.* at 549.

parties are unable to participate meaningfully in the rulemaking process without some notice of the direction in which the agency proposes to go."[67] Generally requesting comment on the NANC report does not give any indication of how the FCC views the report's individual recommendations, and thus lacks the requisite notice of the FCC's intent.

Nor would rules adopted based on a NANC report be a permissible "logical outgrowth" of the agency's proposals. Even though the "logical outgrowth" test does not require an agency to "assiduously lay out every detail of a proposed rule for comment," an agency is required to provide notice of the substance of a proposed rule with "sufficient detail and rationale for the rule to permit interested parties to participate meaningfully."[68] In effect, the Commission is required to provide the opportunity for notice and comment on a concrete proposal from which the resulting rule logically could be derived. As discussed above, simply seeking comment on a NANC report would not constitute such specificity. In the absence of a concrete proposal, there can be no logical outgrowth. Further, a rule can only be considered a logical outgrowth when commenters already have had the opportunity to provide the agency with all of the decisionally significant information based on the underlying proposal.[69] Merely seeking comment broadly on a NANC report would not provide this level of opportunity, and thus the logical outgrowth test would not be met.

---

[67] *United Church Board for World Ministries v. SEC*, 617 F. Supp. 837, 839 (D.C. Cir. 1985). *See also Small Ref. Lead Phase-Down Task Force v. EPA*, 705 F.2d at 549.

[68] *Horsehead Resource Development v. Browner*, 16 F.3d 1246, 1268 (D.C. Cir. 1994) (quoting *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1311 (D.C. Cir. 1991)).

[69] *See Ass'n of Battery Recyclers v. EPA*, 208 F.3d 1047 (D.C. Cir. 2000).

Complicating matters further, however, CTIA also has described several issues upon which the NANC has never reached consensus. The Commission has failed even to follow its own rules for seeking comment on and resolving these issues.[70] The Commission has yet to seek comment on three of the four NANC reports on CMRS LNP, and has never acted on *any* of the four.[71]

As described in the next section, there are numerous issues related to CMRS LNP that the Commission must resolve if implementation is to move forward. But these issues must be addressed pursuant to a process that meets the legal standards of the APA and the FACA. Because the process currently in the Commission's rules does not meet these legal standards, the Commission must first conduct a rulemaking to adopt a valid process to subject the NANC's recommendations to notice, comment, and Commission consideration – in addition to resolving the crucial issues upon which the NANC has been unable to reach consensus.

III. A VAST ARRAY OF ISSUES NEEDS TO BE RESOLVED FOR SUCCESSFUL IMPLEMENTATION OF CMRS LNP WITH MINIMAL CUSTOMER CONFUSION

CTIA's two recent petitions have described eight (8) important issues that need to be resolved in order for CMRS LNP to be implemented successfully and with minimum customer

---

[70] *See, e.g., Achernar Broad Co. v. FCC,* 62 F.3d 1441 (D.C. Cir. 1995) (It is a "rudimentary principle that agencies are bound to adhere to their own rules and procedures."). *See also Reuters, Ltd. v. FCC,* 781 F.2d 946, 950 (D.C. Cir. 1986); *Way of Life Television Network, Inc., v. FCC,* 593 F.2d 1356, 1359 (D.C. Cir. 1979); *Teleprompter Cable Comm. Corp. v. FCC,* 565 F.2d 736, 742 (D.C. Cir. 1977); *Union of Concerned Scientists v. Atomic Energy Comm'n,* 499 F.2d 1069, 1082 (D.C. Cir. 1974).

[71] Under section 52.26, if the Commission takes no action after placing a NANC report on public notice, the NANC Chair's recommendation on the issue is deemed adopted. In the present case, however, the NANC Chair proffered no recommendations on the contested issues, such as the porting interval.

confusion and dislocation.[72] These issues are crucial and it is incumbent on the Commission to resolve them. CTIA's list is not, however, exhaustive. As CTIA has described, the uncertainty that the Commission has left regarding CMRS LNP standards "will cause tremendous customer confusion that will negate any hoped-for benefits from the rule."[73] The Commission must resolve, through a legally sound process, all of the issues that CTIA has identified, as well as the issues identified here, as soon as possible. In Cingular's view, resolution by Labor Day (the date suggested by CTIA) will be too late.

A. The Commission Must Clarify that the LNP Obligation Does Not Trump the Longstanding Policy of Reliance on Market Forces in the CMRS Context

The Commission's attempt to delegate LNP implementation issues to the NANC for resolution is perhaps most clearly inappropriate with respect to competition-related business issues. Because the Commission's lack of guidance has left most LNP implementation issues to carrier-to-carrier agreements, the Commission must now clarify whether its LNP requirement trumps the open market policy the Commission has fostered between CMRS carriers and their customers. Failure to do so will exacerbate consumer consequences.

In particular, the Commission must clarify that its LNP order did not abrogate or abridge agreements between customers and carriers. The Commission has a longstanding policy of leaving the basic terms for mobile telephone service to be set in the competitive marketplace. As

---

[72] The Rate Center Petition identified (1) the rate center issue; the CTIA Petition identified (2) the porting interval, (3) the interconnection agreement issue, (4) the Sprint/BellSouth dispute, (5) the issue of Type-1 numbers, (6) the definition of the top 100 MSAs, (7) the bona fide request requirement, and (8) the obligation to support nationwide roaming.

[73] CTIA Petition at 5.

a result, the terms of each carrier's agreements with its subscribers are a product of free market forces rather than tariffs reviewed and approved by a regulator. Of course, differences in the terms and conditions of such agreements, whether on price, geographic coverage, or other issues, are a primary and fundamental means of competition among carriers. By failing to issue rules that would govern the implementation of LNP, and leaving the details to be determined by agreement among the carriers, the Commission has created what some carriers apparently perceive as an opportunity to undermine the freedom of contract between wireless carriers and customers.

Indeed, at least one carrier has suggested that the FCC's wireless LNP rules should be viewed as having abrogated carriers' customer agreements to the extent that the agreements include conditions on porting. Verizon Wireless argues that the "bilateral contractual relationship between the old service provider and its customer … cannot be used as an irrelevant basis to subvert porting by refusing to port to the new service provider when the customer directs it."[74] If given effect, Verizon Wireless's position would preclude customers from agreeing to condition number porting on payment, or any other condition. Yet, for the past few years, Cingular's service agreements with its customers specify that Cingular is not obligated to transfer a telephone number if the customer's account is not paid in full.[75] Thus, under their contracts, customers have agreed to condition any right to port a number on their fulfillment of

---

[74] Ex parte letter from John T. Scott, III, Verizon Wireless, to Marlene H. Dortch, FCC, CC Docket No. 95-116 (filed May 20, 2003).

[75] The language, which has been standard in Cingular's customer service agreements for two years, states: "In the event that portability is required, your account must first be paid in full in order to request transfer of the number to another carrier."

their obligations under the agreements. If given effect by the Commission, Verizon Wireless's position would effectively nullify such provisions in customer agreements.

As described below, there is no legal or policy basis for the Commission to interfere with this contract term, particularly given the robust state of competition in the CMRS marketplace. Yet, to resolve currently pending negotiations for intercarrier LNP implementation agreements, as well as to make actual customer roll-out of LNP possible, the Commission must state clearly that its LNP order does not abrogate such a contract provision.

First, it is beyond the Commission's power to abrogate terms in carriers' customer service agreements.[76] A regulatory agency may interfere with common law contractual rights only where Congress has clearly authorized or directed it to do so, or where such interference is critical to implementing the statute.[77] The Communications Act of 1934 contains no such explicit authorization.[78] The existence of these contracts also raises the legal imperative to avoid retroactive rulemaking.[79]

Even if the Commission could abrogate such agreements, however, to do so would fly in the face of the Commission's longstanding policy of allowing the marketplace to determine the

---

[76] *Regents v. Carroll,* 338 U.S. 586, 602 (1949).

[77] *See FTC v. Raladan Co*., 283 U.S. 643, 649 (1930); *Texas & Pacific Railway Co. v. Abeline Cotton Oil Co*., 204 U.S. 426, 437 (1907); *Bauers v. Heisel*, 361 F.2d 581, 587 (3d Cir. 1966) (*en banc*), *cert. denied*, 386 U.S. 1021 (1967).

[78] *Bell Tel. Co. of Pa. v. FCC*, 503 F.2d 1250, 1280 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975).

[79] *See Bowen v. Georgetown Univ. Hosp.,* 488 U.S. 204, 212-14 (1988).

basic service terms for mobile telephone service.[80] To reverse that policy now would require the Commission to offer a thorough, reasoned explanation for its sudden change in course.[81]

Indeed, any interference with a carrier's right to bargain for reasonable early-termination fees or other charges would undermine the current pricing structure for a carrier that includes such a fee in its subscriber agreements. Currently, wireless carriers expend significant resources to acquire customers. Although advertising and retail outlet costs are also significant, a large component of the customer acquisition cost is often a subsidized handset, which has evolved into a common industry practice. In consideration for the benefits consumers receive from wireless carriers' efforts to win them as customers, it is not unreasonable for carriers to bargain for contractual terms to provide for the recovery of their costs. Primary among these is the early-termination fee, which provides certainty that the carrier can recoup at least some of its customer-acquisition costs.[82] In Cingular's case, as noted above, customers also have agreed to the condition that Cingular will not port their numbers to another carrier until such charges have been paid. Thus, the early-termination and porting provisions are fundamental aspects of the bargain struck between Cingular and its customers. Both the carrier and the customer will have weighed the respective costs and benefits (including the carrier's substantial customer

---

[80] *Orloff v. Vodafone AirTouch Licenses LLC,* 17 FCC Rcd 8987, 8998 (2002) (Commission has regulated CMRS through competitive market forces and allows customers and carriers to establish terms of service through open bargaining).

[81] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 57 (1983); *Greater Boston Television v. FCC,* 44 F.2d 841, 852 (D.C. Cir. 1970).

[82] Cingular currently provides a 15-day trial period to new customers during which they are free to terminate their service before the early-termination penalty applies.

acquisition cost) in reaching their agreement.[83] To abrogate such a provision would frustrate Cingular's legitimate contractual expectations, depriving it of the benefit of its bargain without any compensation. Given that it is the Commission's stated policy to uphold this bargain, the Commission cannot exalt LNP implementation issues over these much larger policy and legal considerations.

Moreover, Cingular believes it is in the customer's best interest to be reminded of the early termination charge before the port is effectuated. The customer may not be aware that the contract term is not yet completed, and may intend to complete the contract term before changing carriers. A customer porting a number probably will not have contacted Cingular directly to terminate service, and will have no other opportunity to be reminded of the early termination charge before it is incurred. Thus, only by holding the port in these situations until the customer has contacted Cingular can the customer's interests be protected.

For all of these reasons, the Commission should clarify that, if a customer has negotiated a contract which requires a customer to pay outstanding fees prior to porting, the carrier's obligation to port does not attach until the outstanding balance is paid.

There are clear limits on the Commission's authority to interfere with a carrier's contractual relationships with its customers. To construe the LNP order as abrogating these agreements would conflict with Congressional and Commission mandates to allow competition rather than regulation to govern wireless markets. The Commission must clarify that its CMRS LNP order does not abridge or amend subscriber agreements, or interfere with a carrier's right to negotiate agreements with its subscribers. Indeed, it is important that the Commission clarify

---

[83] The Commission clearly decided not to involve itself in CMRS carriers' business
(continued on next page)

that the larger and more fundamental goal of competition will not be subordinated to the goal of LNP implementation.

B. The CTIA Petition Raises Important Issues that Must Be Resolved

The eight issues CTIA has identified are indeed crucial to CMRS LNP implementation. Cingular previously has commented on the rate center issue.[84] The seven issues in the present petition are no less important.

Split Rating and Routing Points. CTIA rightly observes that several parties, mostly smaller incumbent LECs and their associations, have pointed out that the controversies regarding carriers' rights to split their numbers' rating and routing points, raised before the Commission in a petition by Sprint, will become substantially more prevalent once CMRS LNP is implemented.[85] Indeed, this issue is inextricably tied to the rate center issue raised again in CTIA's earlier petition. In order for a wireless carrier to port in numbers from a wireline carrier located in a rate center in which the wireless carrier lacks direct interconnection, the wireless carrier must be able to specify a different routing point (likely a regional tandem to which both its mobile switch and the porting-out carrier's end-office switch are connected) than the rate center where the number is located.[86] Consumers and carriers alike need to know how porting will affect the rating of calls to ported numbers when carriers are indirectly connected.

---

judgments. *See Orloff, supra,* 17 FCC Rcd at 8998-99.

[84] Cingular rate center comments, CC Docket No. 95-116 (filed Mar. 13, 2003).

[85] CTIA Petition at 25-26.

[86] Cingular and other parties have pointed out that the rate center issue also arises in a wireless-to-wireless context. Although two wireless carriers may provide wireless service in the same rate center, they may not have the same degree of "presence" in the rate center. *See* Cingular rate center comments, CC Docket No. 95-116 (filed Mar. 13, 2003) at 2.

Similarly, the Commission must resolve the intercarrier compensation issues for indirect interconnection so that carriers understand how porting may affect these arrangements.

Porting Intervals. Without uniform, enforceable porting intervals for wireless-wireline and wireless-wireless ports, the porting of numbers to or from CMRS carriers will be chaos. As CTIA correctly has described, the industry has been at an impasse for years on resolving the wireless-wireline porting interval.[87] Despite several requests for Commission resolution, the Commission has failed to act. Thus, there is absolutely no standard for ports between wireline and wireless carriers.

The prospect of intermodal portability was a fundamental pillar of the Commission's rationale for requiring CMRS carriers to implement LNP capability.[88] A rulemaking therefore must be conducted to determine the appropriate wireline-wireless porting interval.

In addition, however, no enforceable *wireless-wireless* porting interval has been established. Under the auspices of the NANC, the wireless industry has established a goal for completing simple ports. This goal includes a response from the porting-out carrier within 30 minutes of receipt of a port request and, if there are no conflicts or delays, the processing of the port through the Number Portability Administration Center ("NPAC") within 2 hours thereafter. But because, as noted above, the industry process that arrived at this two-and-one-half hour

---

[87] *See* CTIA Petition at 11-15.

[88] *LNP First Report & Order,* 11 FCC Rcd at 8436 ¶160. *See also Verizon Wireless's Petition for Partial Forbearance from the Commercial Mobile Radio Services Number Portability Obligation,* 17 FCC Rcd 14972, 14980 ¶18 (2002).

wireless-wireless porting interval has no force of law,[89] there is no way to ensure that wireless carriers universally will implement the porting interval.

Thus, presently there is no enforceable porting interval for any port of a number to or from a CMRS carrier.

Support of Nationwide Roaming. As a result of the Commission's failure to oversee wireless LNP implementation, some carriers in rural areas have failed to adopt the industry standard LNP implementation technology (separation of the mobile identification number, MIN, from the mobile directory number, MDN). This failure is likely to have a substantial impact on customers' ability to roam on other carrier's networks, or on the quality of service and billing while roaming. The Commission must ensure that all CMRS carriers, whether or not subject to the LNP requirement, implement the MIN/MDN separation to support nationwide roaming.

Need for Interconnection Agreements. Various carriers have taken different positions on whether porting between carriers should proceed pursuant to an interconnection agreement or merely a service-level porting agreement. It is a fundamental question that must be answered before CMRS LNP can be implemented effectively. Indeed, resolution of this issue will determine whether any impasses in intercarrier LNP negotiations will be decided by the Commission or by state PUCs pursuant to the process under sections 251 and 252 of the Act.[90] At minimum, the Commission must clarify that there must be some form of agreement between the carriers regarding LNP implementation, whether it is a formal interconnection agreement or a

---

[89] *See supra* Section II.

[90] 47 USC §§ 251, 252 (calling for arbitration by state commissions of interconnection disputes among carriers).

service-level agreement. The Commission also must clarify the scope of the carriers' obligations in the event the carriers cannot reach agreement in time for the LNP implementation date.

Whether the Commission concludes that carriers' LNP implementation agreements should take the form of interconnection agreements, arbitrated by the states under sections 251 and 252, or service-level agreements for which the Commission ultimately will have responsibility, the Commission must establish uniform national rules for their negotiation and arbitration. As the Commission has acknowledged in the interconnection context, the existence of uniform national rules will provide guidance to carriers, as well as to states as arbitrators (if interconnection agreements) or to the Commission staff (if service-level agreements). In either event, the Commission should be aware that countless disputes will need to be resolved by regulators before final agreements are reached among all carriers to permit CMRS LNP.

Type-1 Interconnection Issues. CTIA correctly identifies issues related to porting Type-1 numbers as crucial for CMRS LNP implementation.[91] Resolution of these issues, however, probably is not as simple as CTIA proposes. Eliminating rate center validation[92] alone would not resolve the problem, because a process would still need to be adopted for the exchange of customer validation information for Type-1 numbers.[93] Also, although CTIA may be correct to say that this is a "procedural" rather than a "technical" barrier to CMRS LNP implementation,

---

[91] CTIA Petition at 26-29.

[92] *See* CTIA Petition at 28.

[93] In the case of Type-1 numbers, a LEC is technically the holder of the numbers which are used by a wireless carrier. Thus, LECs play a primary role in the ports of wireless numbers obtained through Type-1 interconnection. It is Cingular's understanding that LECs intend to use the wireline-CLEC procedures for Type-1 ports, which do not include adequate customer validation procedures.

the same could be said for virtually all of the issues raised in both of CTIA's petitions – but that makes resolution of the issues no less essential for CMRS LNP implementation, nor any less the Commission's responsibility.

Definition of Top 100 MSAs. The CMRS LNP rules establish different (and sooner) implementation timelines for areas inside the top 100 MSAs than in smaller markets.[94] Yet, the Commission has failed to specify definitively how the top 100 MSAs are defined.[95] As CTIA has stated, this indecision leaves "carriers in at least twenty markets … in a position of not knowing whether they will have to implement LNP on November 24, 2003."[96] This is an untenable situation that must be resolved well in advance of the implementation date.

Bona Fide Request Requirement. The Commission also has failed to resolve whether carriers operating inside the largest 100 MSAs must implement LNP in the absence of a bona fide request from another carrier.[97] The Commission cannot expect CMRS LNP to be implemented in a timely fashion if the parameters of the obligation have not been squarely set out in legally enforceable rules.

Resolution of these issues will fundamentally affect the parameters of CMRS portability, between wireline and wireless carriers and wireless and wireless carriers. Hence, it is incumbent

---

[94] 47 CFR § 52.31(a) (requiring CMRS LNP only within the top 100 MSAs); *Local Number Portability,* First Memorandum Opinion & Order on Reconsideration, 12 FCC Rcd 7236, 7314 (1997) (requiring CMRS carriers to implement LNP outside the top 100 MSAs within 6 months of a bona fide request).

[95] CTIA Petition at 30-31.

[96] *Id.*

[97] CTIA Petition at 31.

upon the Commission to resolve them promptly if it expects CMRS carriers to implement LNP in a timely fashion.

C. Additional Issues Also Must Be Resolved

There are additional issues that have been discussed in the NANC bodies addressing CMRS LNP, not raised in either of the CTIA petitions, that must be resolved in order for CMRS LNP to be implemented properly. First, there are *billing issues* that arise during the "mixed-service" period. The "mixed-service" period is the time during the porting interval when the porting-in carrier has initiated service but before the NPAC database has been updated and before the porting-out carrier has discontinued service.[98] During this time, the NPAC database will still identify the telephone number with the old carrier, although the customer will have outbound service from the new carrier. This could create problems for intercarrier compensation if calls originating on the network of the new carrier are attributed to the old carrier. For example, the old carrier could be charged for reciprocal compensation by a carrier that terminates a call that actually originated on the new carrier's network.

The NANC groups also never reached resolution of the *directory listing issues* that arise when CMRS carriers begin to participate in LNP.[99] Wireline carriers generally list their customers' telephone numbers in a directory, while CMRS customers generally prefer not to have their numbers listed in directories and, thus, wireless carriers have not automatically provided directory listing service.

---

[98] The CTIA Petition discusses other serious problems that arise during the mixed-service period, such as E-911 issues. *See* CTIA Petition at 10.

[99] *See* NANC LNPA-WG Third Report on Wireless-Wireline Integration (Sept. 30, 2000) at § 5.2;

It is not clear what wireline carriers must do with respect to directory listings when they port a number to a CMRS carrier. Nor is it clear what the two carriers' respective directory listing responsibilities are when a wireless number is ported to a wireline carrier. It also is unclear what will occur if some wireless carriers, but not others, begin providing their customers with directory listing services. What are the responsibilities in cases of ports between carriers that provide such listings and those that do not?

Because the NANC process that "resolved" many wireless-specific portability issues had no force of law,[100] the conclusions it reached regarding *inter-service provider LNP operations flows*, including the exchange of information and the *mandatory population of the Jurisdictional Information Parameter ("JIP")*[101] in the intercarrier exchange of information, are not enforceable. The wireless industry has rejected the use of the JIP in wireless standards meetings due to concerns that the JIP will not identify the proper jurisdiction, as wireless switches' can serve multiple rate centers, LATAs, or even states. Thus, a very real risk exists that carriers will implement different and inconsistent process and information flows for LNP, undermining implementation by the industry as a whole and substantially increasing all carriers' costs.

---

[100] *See supra* Section II.

[101] Among wireline carriers, the JIP is used to identify the rating jurisdiction of a call's originating switch.

CONCLUSION

The Commission lacks jurisdiction to impose the LNP requirement on CMRS carriers. Yet, if the Commission persists in its pursuit of CMRS LNP, it must resolve its abdication of its responsibility to provide for a legally sufficient process to implement CMRS LNP. Instead, it has unlawfully delegated virtually all authority to the NANC in violation of the FACA and the APA. Before CMRS LNP can go forward, the Commission must initiate a rulemaking to establish a legal process not only to resolve the issues left open by the NANC and the business issues that the NANC did not address, but also to subject the CMRS LNP standards and processes that the NANC successfully resolved to notice and comment, and ultimately to vest in them the force of law, including a statement of the basis and purpose for any rules adopted. Only then can the Commission proceed to resolve the many substantive implementation issues in rules of general applicability. The Commission must do so as soon as possible – and the Labor Day deadline suggested by CTIA is too late. Failure to resolve these issues will result in substantial consumer confusion and dislocation.

Respectfully submitted,

CINGULAR WIRELESS LLC

By: _____

J. R. Carbonell
Carol L. Tacker
David G. Richards
5565 Glenridge Connector
Suite 1700
Atlanta, GA 30342
(404) 236-5543

Its Attorneys

June 13, 2003